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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSE E. SARMIENTO, Defendant and Appellant.	D072571 (Super. Ct. No. SCN346521-3)

APPEAL from a judgment of the Superior Court of San Diego County, Richard R. Monroy, Judge. Affirmed.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C. Cavalier, Elizabeth M. Kuchar, and Joseph C. Anagnos Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Jose Sarmiento guilty of one count of first-degree murder by means of "lying-in-wait" (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(15)),[1] one count of attempted murder (§§ 187, subd. (a), 664), and three counts of shooting at an inhabited dwelling house (§ 246), and found true allegations sustaining gang enhancements (§ 186.22, subd. (b)(1), (4), & (5)) and firearm enhancements (§ 12022.53, subds. (d) & (e)(1)) attached to each count. The court sentenced Sarmiento to life in prison without the possibility of parole, plus an additional 153 years to life in prison.

Sarmiento raises numerous arguments on appeal, contending the trial court erred by denying his request to introduce one of his codefendants' change of plea forms into evidence, limiting the testimony of a defense witness on grounds that the probative value of her testimony was substantially outweighed by countervailing considerations, and refusing to give a special (pinpoint) jury instruction regarding his theory that one of his codefendants fired the gunshots giving rise to the charges against him. Sarmiento also raises challenges specific to his convictions for discharging a firearm at an inhabited dwelling house, arguing that substantial evidence does not support one of the convictions, the court erred by refusing to instruct the jury on the lesser included offense of negligent discharge of a firearm, and the court erred by declining to stay two of the sentences.

We find no error or, in the alternative, conclude that Sarmiento experienced no prejudice from any claimed error. Accordingly, we affirm the judgment.

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1 All further statutory references are to the Penal Code, unless otherwise noted.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Events Preceding the Death of Steven Larussa*

Diablos is the most violent and active criminal street gang in the City of Escondido. Diablos has approximately 250 members and is responsible for engaging in stabbings, robberies, and shootings, among other offenses. At all times relevant to this case, Sarmiento and Juan Maldonado were active members of Diablos.

In May 2015, Diablos sought to acquire guns to use against a rival Escondido gang. Accordingly, Sarmiento entered into an agreement with a member of a Fallbrook gang to buy four guns for $700. Sarmiento collected money from members of Diablos, which he gave to the Fallbrook gang member. An associate of the Fallbrook gang was supposed to travel to Los Angeles to obtain the guns for the sale, but he returned from Los Angeles without the guns and without Sarmiento's money. Sarmiento made several attempts to recover the money from the Fallbrook gang member who had agreed to sell the guns; however, he was only able to repay a portion of the money, stopped answering his phone, and started evading Sarmiento. Diablos viewed the botched gun sale and the failure to fully repay Sarmiento as a sign of disrespect, both to Diablos and Sarmiento. Sarmiento's then girlfriend, for instance, testified that Sarmiento called the Fallbrook gang member a "punk" because he "wouldn't come through" with the money he owed. Similarly, Maldonado testified that Sarmiento thought the Fallbrook gang member had treated him like a "bitch" and a "punk."

B. *The Death of Steven Larussa*

On June 9, 2015, the Fallbrook gang member contacted Sarmiento and set up a meeting, ostensibly so he could repay the remainder of his outstanding debt. However, Maldonado testified that Sarmiento possessed a gun and planned "to get" the Fallbrook gang member at the planned meeting.

Sarmiento, Maldonado, Jessica Espinoza (Maldonado's girlfriend), and another Diablos gang member named Carlos Soto drove to the Fallbrook gang member's neighborhood that afternoon. Maldonado and Espinoza testified that Maldonado drove the vehicle, Espinoza sat in the front passenger seat, and Sarmiento and Soto sat in the backseat.[2] Maldonado testified that he was wearing a blue or gray shirt with lettering on it and Sarmiento was wearing dark pants and a hat. Surveillance video from a residence in the neighborhood shows Sarmiento wearing dark pants, a hat, and a white rosary. Additionally, surveillance footage from a convenience store in the area filmed shortly before the events at issue shows the driver of the vehicle wearing shorts and a blue shirt with lettering on it and an individual in the backseat wearing a hat and a white rosary.

After Sarmiento, Maldonado, Espinoza, and Soto arrived in the neighborhood, one of the occupants from the vehicle exited and ducked behind a parked truck, while the remaining occupants parked on a nearby cul-de-sac. A neighbor who witnessed the events testified that the Fallbrook gang member and another male named Steven Larussa

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[2] Espinoza did not testify live at Sarmiento's trial. However, her testimony from the preliminary hearing was read into the record at Sarmiento's trial. All references to Espinoza's testimony shall refer to her preliminary hearing testimony.

were walking down the street and, when they had their backs turned, the individual who had ducked behind the parked truck walked towards the two men and fired several gunshots at them. According to the neighbor, the shooter fired three or four shots and paused before firing a second round of gunshots. Another neighbor testified the gunshots lasted approximately 30 seconds. The Fallbrook gang member escaped the gunfire, but Larussa was struck in the head and killed. The shooter ran back to the vehicle and climbed into the backseat as it sped away.

Maldonado and Espinoza testified that Maldonado was the getaway driver and Sarmiento was the individual who had exited the vehicle and discharged the firearm at the victims. They testified they heard gunshots and witnessed Sarmiento running back to the vehicle claiming he "shot the wrong guy." Sarmiento's defense theory, on the other hand, was that Espinoza was the getaway driver and Maldonado was the individual who had exited the vehicle and fired at the victims.

C. *The Investigation*

Police recovered 10 semi-automatic firearm shell casings from the street, dirt, and sidewalk near where the shooter had crouched behind the parked truck. One bullet passed through the front door of a neighboring residence and lodged in the dining room wall. Another bullet passed through a window of a second neighboring residence. A bullet struck a metal gate in front of a third residence as well, leaving an indentation in the slat of the gate. Larussa's body was discovered in front of the indented metal gate. In addition, police discovered shoe impressions in the dirt near the location of the shooting.

Sarmiento owned a pair of skateboard shoes that had length, design, and wear characteristics similar to the shoes that left the impressions at the scene of the shooting.

Neighbors and other witnesses testified that the shooter was a Hispanic male who wore a black hat and dark pants or jeans. Four witnesses identified Maldonado as the shooter when presented with a photograph of a lineup that included Maldonado. However, one of the witnesses later identified Sarmiento as the shooter and testified to that effect at trial, another one of the witnesses testified she was not wearing her glasses at the time of the shooting and "didn't get a very good look" at the shooter, a third witness testified he was unsure of his identification of Maldonado, and the fourth witness testified she "did not see the [shooter's] face at all."

D. *The Charges and Pretrial Proceedings*

Sarmiento, Maldonado, Espinoza, and Soto were arrested, and Sarmiento, Maldonado, and Soto were charged by amended information with one count of murder, one count of attempted murder, and three counts of shooting at an inhabited dwelling house. Espinoza was charged with one count of being an accessory to a felony. Additionally, the defendants were charged with various gang and firearm enhancements.

Following her arrest, Espinoza accepted a plea agreement under which she pleaded guilty to being an accessory after the fact with a sentence of up to three years in prison and agreed to enter a witness relocation program. In exchange, the police released Espinoza from custody pending sentencing and dropped the gang enhancement charges pending against her. Espinoza was relocated and placed with her aunt's family. However, while living with her aunt, Espinoza began a sexual relationship with her aunt's

son, a minor. After her aunt learned of the relationship, she expelled Espinoza from her home and Espinoza was charged with engaging in sexual intercourse with a minor.

Prior to trial, Maldonado and Soto also accepted plea agreements, leaving Sarmiento as the sole remaining defendant. Under Maldonado's plea agreement, Maldonado pleaded guilty to voluntary manslaughter, having a gun in the vehicle, and a gang enhancement, accepted a prison sentence of 24 years, and agreed to testify during Sarmiento's trial. Maldonado's change of plea form was admitted into evidence and Maldonado testified about the terms of the plea agreement during Sarmiento's trial.

Under Soto's plea agreement, Soto pleaded guilty to assault and accepted a prison sentence of three years. Soto did not testify at Sarmiento's trial, yet one of the prosecution's witnesses testified that all of Sarmiento's codefendants (including Soto) had pleaded guilty.[3] Following this testimony, Sarmiento sought to introduce Soto's change of plea form into evidence, arguing it was necessary to show that Soto had only pleaded guilty to assault and not a murder-related charge. The trial court denied Sarmiento's request on grounds that the change of plea form was irrelevant and would unduly prolong the trial by permitting the prosecution to call an expert witness regarding the dynamics of the plea process. However, the court offered to strike and instruct the jury to disregard the pertinent portion of the prosecution witness' testimony. Sarmiento's counsel declined the court's offer based on its stated belief that the instruction would draw outsized

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[3] Sarmiento concedes the prosecution did not intentionally elicit the testimony regarding Soto's guilty plea from its witness.

attention to the prosecution witness' testimony. In accordance with Sarmiento's request, the court did not instruct the jury to disregard the witness' testimony.

E. *Conviction and Sentencing*

After a three-week trial, the jury found Sarmiento guilty of first-degree murder with the special circumstance of lying-in-wait (§§ 187, subd. (a), 190.2, subd. (a)(15) (count 1)), attempted murder (§§ 187, subd. (a), 664 (count 2)), and three counts of shooting at an inhabited dwelling house (§ 246 (counts 3-5)). Further, it found true the gang enhancement allegations attached to each count (§ 186.22, subd. (b)(1), (4), & (5)) and various firearm enhancements (§ 12022.53, subds. (d) & (e)(1)).

On July 28, 2017, the court sentenced Sarmiento to life in prison without the possibility of parole, plus an additional 153 years to life, calculated as follows: life in prison without the possibility of parole for the murder conviction (count 1), seven years to life for the attempted murder conviction (count 2), the upper term of seven years to life for each of the three convictions for shooting at an inhabited house (counts 3-5), and 25 years to life for each of five firearm enhancements. As for the gang enhancements, the court imposed the minimum parole eligibility date.

II

DISCUSSION

A. *Soto's Change of Plea Form*

Sarmiento argues the trial court erred by denying his request to admit Soto's change of plea form into evidence, which would have shown that Soto pleaded guilty to an assault charge and not a murder-related charge. Sarmiento claims such evidence was

necessary to cure the alleged prejudice he experienced when the prosecution's witness testified that Sarmiento was the only codefendant in the case that had not pleaded guilty. According to Sarmiento, the jurors may have assumed, in the absence of Soto's change of plea form, that Soto pleaded guilty to a murder-related offense and impute that same guilt on Sarmiento. Sarmiento claims the court's exclusion of the change of plea form violated his rights to due process and a fair trial under the California Constitution (Cal. Const., art. I, § 15) and the Fifth and Fourteenth Amendments to the federal Constitution.

"The general rule is that evidence regarding the guilty plea or conviction of a coparticipant in a crime is not admissible to prove guilt of a defendant. [Citations.] The rationale for the rule is that a guilty plea or conviction of a participant is irrelevant to whether another person was positively and correctly identified as a coparticipant, and merely invites the inference of guilt by association." (*People v. Neely* (2009) 176 Cal.App.4th 787, 795 (*Neely*); *People v. Mackey* (2015) 233 Cal.App.4th 32, 119.) Sarmiento argues the testimony from the prosecution's witness contravened this rule and, therefore, was inadmissible. The People do not dispute Sarmiento's argument and, therefore, we presume without deciding that the admission of the testimony was improper.

However, that does not end our inquiry, as we must now determine whether, as Sarmiento argues, the court abused its discretion by denying his request to cure the improper testimony through the admission of Soto's change of plea form. As to this question, we find no abuse of discretion. As noted, the trial court indicated a willingness to strike the witness' testimony from the record and instruct the jury to disregard the

testimony. "Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction." (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834; see *People v. Chatman* (2006) 38 Cal.4th 344, 405 ["We assume the jury followed [its] instructions, and that any prejudice from the brief reference to burglaries was thus avoided."].) Sarmiento's counsel declined the court's proposal for tactical reasons, opting instead not to draw any further attention to the testimony. However, that decision does not suggest that the trial court's proffered solution amounted to an abuse of discretion.

On the contrary, we find the court's offer to have been a sensible means by which to cure the allegedly improper testimony, particularly compared to Sarmiento's proposal. Sarmiento's proposal called for the trial court to admit *additional* evidence regarding the pleas of his codefendants even though, as noted, the relevance of such evidence is questionable at best. (*Neely, supra*, 176 Cal.App.4th at p. 795.) It also would have permitted the prosecution to call its own expert witnesses regarding the dynamics of the plea process, further prolonging the lengthy trial and potentially confusing the jury on a tangential issue involving an individual who did not testify during Sarmiento's trial. Under these circumstances, the trial court did not abuse its discretion insofar as it concluded that the probability of delay and confusion from the admission of the change of plea form substantially outweighed the form's relevance. (Evid. Code, § 352.)

Even if the court had erred, any such error was harmless. " 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe

on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 [(*Watson*)] . . . and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24).' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428; *People v. Leonard* (1983) 34 Cal.3d 183, 189 [applying *Watson* standard of review to erroneous admission of coarrestee's guilty plea].)

Applying the *Watson* standard of review to the facts of this case, we conclude it is not reasonably probable Sarmiento would have achieved a more favorable result had the trial court introduced Soto's change of plea form. Sarmiento's defense theory was that Maldonado—not Sarmiento—committed the shootings that gave rise to the charges against Sarmiento. Indeed, Sarmiento repeatedly emphasizes his trial theory in his appellate briefing, arguing, for example, that "[t]he issue at trial boiled down to identity evidence - who pulled the trigger on June 9." However, Soto's change of plea form would have disclosed *nothing* about the identity of the shooter or the circumstances of the shooting. Thus, the introduction of Soto's change of plea form would not have made it

any more likely that jurors would have harbored a reasonable doubt as to whether Maldonado, rather than Sarmiento, was the shooter, and any claimed error was harmless.

B. *Espinoza's Out-Of-Court Statement*

Prior to trial, Sarmiento's trial counsel and the prosecution each interviewed Espinoza's aunt, the relative with whom Espinoza lived after she accepted her plea agreement and entered a witness relocation program. According to Sarmiento's counsel, Espinoza's aunt stated during the interview that while Espinoza was staying with her, Espinoza told her "it wasn't the first time that she and [Maldonado] had done something like this," i.e., the killing of another person. During her interview with the prosecution, Espinoza's aunt also stated that Espinoza told her this was not the first time "they" had killed someone. Espinoza did not specify the persons to whom she was referring when she used the pronoun "they" or the persons "they" purportedly had killed.

After this interview, the prosecution filed a motion in limine to preclude Espinoza's aunt from testifying about Espinoza's out-of-court statement on grounds that its relevance was substantially outweighed by the probability of undue prejudice under Evidence Code section 352.[4] The trial court found that although Espinoza's statement potentially could qualify as a statement against penal interest, an exception to the hearsay rule (Evid. Code, § 1230), Espinoza's sexual relationship with her aunt's minor son and her aunt's resultant anger towards Espinoza undermined the reliability of Espinoza's out-

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4 Evidence Code section 352 provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

of-court statement. Therefore, the court concluded, the statement was only potentially admissible for impeachment purposes. However, the court declined to allow testimony about the statement even for impeachment, reasoning that "piles and piles of impeachment" evidence regarding Espinoza had already been introduced.

On appeal, Sarmiento contends the trial court's ruling was erroneous because the testimony at issue was admissible not only for impeachment purposes, but also as evidence of Espinoza's involvement in Larussa's killing. According to Sarmiento, Espinoza's out-of-court statement would have tended to show that Espinoza and Maldonado were "more involved in the present offense" than their trial testimony suggested, thereby "weakening the prosecution's case against Sarmiento as the shooter even more." "A trial court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion." (*People v. Dehoyos* (2013) 57 Cal.4th 79, 131.)

We need not decide whether the trial court abused its discretion by limiting the testimony of Espinoza's aunt because, assuming without deciding such error occurred, there was no resulting prejudice. Sarmiento cites inapplicable federal decisions in support of his contention that we should apply the reasonable-doubt standard discussed in *Chapman v. California*, *supra*, 386 U.S. at p. 24. (See, e.g., *Webb v. Texas* (1972) 409 U.S. 95, 98 [defendant deprived of due process rights where court gratuitously implied defendant's sole witness would lie]; *Washington v. Texas* (1967) 388 U.S. 14, 19 [defendant deprived of Sixth Amendment rights by statute prohibiting persons charged or convicted as coparticipants from testifying for one another].) However, unlike the decisions cited by Sarmiento, which concerned egregious restrictions on a defendant's

ability to present evidence and cross examine witnesses, the ruling in this case did not amount to a complete exclusion of Sarmiento's evidence or impairment of his ability to present a defense. Rather, they constituted standard determinations under Evidence Code section 352, which "do not ordinarily implicate the federal Constitution, and are reviewed under the 'reasonable probability' standard" of *Watson, supra*, 46 Cal.2d at p. 836. (*People v. Gonzalez* (2011) 51 Cal.4th 894, 924; see *People v. Brown* (2003) 31 Cal.4th 518, 545.)

Applying the *Watson* standard of review, we conclude it is not reasonably probable the jury would have reached a result more favorable to Sarmiento had the excluded testimony been introduced. Insofar as the excluded statement was intended to impeach Espinoza, the jury had already been presented with ample evidence from which to conclude that Espinoza's credibility should be discounted. For instance, the court read the transcript of the preliminary hearing, which contained a statement from the court indicating that Espinoza took "long pauses" before answering questions and, "[i]n many instances, [gave] no response." Espinoza's aunt testified to her apparent bias as well. For example, she testified that Espinoza loved Maldonado and would "do anything she had to do" to get him released from prison, including refusing to testify or feigning forgetfulness. The jury also learned that Espinoza spoke directly and indirectly with Maldonado in violation of the terms of her plea agreement. Finally, testimony was presented indicating that Espinoza had lied to police officers about why her aunt had expelled her from her home in order to cover up her improper sexual relationship with her underage cousin. Additional evidence introduced to impeach Espinoza's credibility

would have been cumulative and of marginal utility, considering the copious impeachment evidence already presented.

To the extent Sarmiento sought to introduce the statement for its truth, i.e., to show Maldonado and Espinoza were involved in the killing of Larussa, the exclusion of the statement likewise did not prejudice Sarmiento. The excluded statement ("it wasn't the first time that [Espinoza] and [Maldonado] had done something like this") was consistent with the People's theory that Sarmiento was the shooter, Maldonado was the getaway driver, and Espinoza was an accessory. In fact, Espinoza's aunt even testified at trial that Espinoza told her Maldonado was the getaway driver, Espinoza sat in the passenger seat, and one of the two men seated in the backseat exited the vehicle before gunshots were fired. In addition, compelling evidence supported the jury's verdict, including an eyewitness who identified Sarmiento as the shooter, surveillance footage showing that the shooter and Sarmiento wore the same clothing, the similarities between Sarmiento's shoes and the shoes that left imprints at the scene of the crime, and evidence that Sarmiento had a motive for the crime (the botched gun sale).

Given the nature of the excluded statement, which did not describe the roles of the various codefendants in the shooting at issue, as well as the considerable incriminating evidence pointing to Sarmiento's guilt, it is not probable that Sarmiento would have obtained a more favorable verdict had the excluded testimony been admitted.

C. *Sarmiento's Pinpoint Instruction*

During the jury instruction process, Sarmiento submitted a pinpoint instruction captioned "Third Party Culpability," which purported to relate applicable legal standards to Sarmiento's theory that Maldonado was the shooter. That instruction provided:

> "You have heard evidence that a person other than the defendant, in this case Juan Maldonado, committed the offense with which the defendant is charged. The defendant is not required to prove Juan Maldonado's guilt. It is the prosecution that has the burden of proving the defendant guilty beyond a reasonable doubt. Therefore, the defendant is entitled to an acquittal if you have a reasonable doubt as to the defendant's guilt. Evidence that Juan Maldonado committed the charged offense may by itself leave you with a reasonable doubt as to the defendant's guilt. However, its weight and significance, if any, are matters for your determination. If after consideration all of the evidence, including any evidence that another person committed the offense, you have a reasonable doubt that the defendant committed the offense, you must find the defendant not guilty.
>
> You are required to resolve in favor of the defendant any reasonable doubt which you have in the choice between the defendant and Juan Maldonado as the person who committed this crime. Thus, if you have a reasonable doubt as to which person committed the offense you must give the defendant the benefit of that doubt and find him not guilty.
>
> If the evidence permits two reasonable interpretations, one of which points to the guilt of the defendant and the other to the guilt of Juan Maldonado you must reject the interpretation that points to the defendant's guilt and return a verdict of not guilty."

The court refused Sarmiento's instruction, reasoning that Maldonado was not a third-party "in the traditional sense" because he had testified at trial and was "identified to the jury." Sarmiento contends this ruling deprived him of his "right to have the jury instructed on his only defense at trial - to connect the evidence he presented with the argument he made." We agree with the trial court that a pinpoint instruction was

unnecessary, though we reach that conclusion for reasons other than those on which the court relied.

"It is generally true that '[a] criminal defendant is entitled, on request, to a[n] instruction "pinpointing" the theory of his defense.' [Citation.] But a request for a particular instruction may be denied if the instruction is argumentative [citation], misstates the law [citation], or duplicates other instructions [citation]." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 851.) " 'We independently review claims of instructional error viewing the evidence in the light most favorable to the appellant.' " (*Uriell v. Regents of Univ. of California* (2015) 234 Cal.App.4th 735, 743.)

To the extent the pinpoint instruction conveyed that the jury had "heard evidence that a person other than the defendant, in this case Juan Maldonado, committed the [charged] offense[s]," it presented a one-sided and argumentative characterization of the evidence and, therefore, was properly denied. (*People v. Hartsch* (2010) 49 Cal.4th 472, 504 (*Hartsch*).) The remainder of the instruction, which discussed the prosecution's burden of proof, was duplicative of other instructions given by the court. For instance, the court charged the jury with reasonable doubt instructions (CALCRIM 220), instructions requiring the jury to draw conclusions pointing to innocence if two or more reasonable conclusions could be drawn from circumstantial evidence (CALCRIM 224), and instructions that the jury could reach guilty verdicts only if it concluded Sarmiento had committed the acts underpinning each count (CALCRIM 520, 600, 965). Accordingly, we find no error in the court's refusal to charge the jury with Sarmiento's pinpoint instruction. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824-825.)

Even if it were error, the court's refusal to charge the jury with Sarmiento's proposed instructions could not have affected the verdict. Because the court instructed the jury on reasonable doubt, competing inferences, and burden of proof, the jury would have returned verdicts of not guilty if it believed the evidence pointed to Maldonado's guilt, rather than Sarmiento's guilt. But it did not. Accordingly, the trial court's ruling, even if it were error, was harmless. (*Hartsch*, *supra*, 49 Cal.4th at p. 504.)

D. *Challenges to Count 4 (Shooting at an Inhabited Dwelling House)*

The jury found Sarmiento guilty of three counts of discharging a firearm at an inhabited dwelling house (§ 246). Sarmiento challenges the sufficiency of the evidence and the jury instructions relating to one of those convictions. In particular, he argues that the evidence—namely, a bullet impact site on the metal gate outside one of the residences—was insufficient to support a finding that he discharged a firearm "at" the residence. Sarmiento challenges the sufficiency of the evidence supporting the finding that the residence at issue was "inhabited," as well. Finally, Sarmiento claims the court erred by denying his request to instruct the jury on the lesser-included offense of discharge of a firearm in a grossly negligent manner (§ 246.3).

i. *Sufficiency of the Evidence*

"On review for substantial evidence we apply a well-settled standard. '[W]e must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—

that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*People v. Kaufman* (2017) 17 Cal.App.5th 370, 380-381.)

The elements of a violation of section 246 are "(1) acting willfully and maliciously, and (2) shooting at an inhabited house." (*People v. Ramirez* (2009) 45 Cal.4th 980, 985 (*Ramirez*).) As noted, Sarmiento challenges the sufficiency of the evidence to support the finding that Sarmiento discharged a firearm "at" the residence surrounded by the metal gate that was struck by the bullet. Sarmiento suggests that a defendant must aim directly at an inhabited dwelling house or, at minimum, strike the inhabited dwelling house to violate section 246. He claims, for instance, that "[a] metal gate cannot substitute for a residence." He further claims he is aware of no published authority in which a bullet has not struck the target (e.g., a residence) and yet a conviction under section 246 has been upheld. These arguments are without merit.

"[S]ection 246 is not limited to shooting *directly* at an inhabited or occupied target. Rather, it proscribes shooting *either* directly at *or* in close proximity to an inhabited or occupied target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it."

(*People v. Overman* (2005) 126 Cal.App.4th 1344, 1355-1356 (*Overman*); accord *People v. Chavira* (1970) 3 Cal.App.3d 988, 992-993 [rejecting argument that shots were not fired "at" building because defendant had fired "at" persons outside the building].) In light of these principles, we conclude that ample evidence supports the jury's verdict.

For example, police testified that they discovered 10 semi-automatic shell casings directly across from the residence at issue and photographic evidence reveals a bullet impact site on the metal gate in front of the residence.[5] Bullet impact sites were also found in a door and a window of two residences on either side of the residence at issue. Further, photographic evidence shows that Larussa's body was found immediately in front of the residence in question. Collectively, this constitutes substantial evidence supporting the jury's finding that the shooter fired at or in close proximity to the residence at issue with conscious disregard for the safety of the persons in and around it.

Moreover, it is not dispositive that a bullet did not strike the residence itself, as Sarmiento suggests. Section 246 contains no requirement that a perpetrator must discharge a firearm at *and strike* an inhabited dwelling house. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1412 ["Adding language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes.' "].) Nor have past judicial decisions recognized such a requirement. On the contrary, courts have upheld section 246 convictions, even where the discharged bullet did not strike the

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5 Sarmiento quibbles that the police officer who testified about the bullet impact site on the metal gate apparently misstated the address of the residence during his testimony. The photographic evidence, however, makes clear that the metal gate with the bullet impact was located in front of the residence described in the amended information.

"target" at issue. (*People v. Buttles* (1990) 223 Cal.App.3d 1631, 1635, 1641 [affirming conviction for discharging a firearm at an occupied motor vehicle where "[a]n examination of his truck and trailers did not reveal any bullet holes or marks"]; accord *Overman, supra*, 126 Cal.App.4th at p. 1357 [rejecting argument that "section 246 requires a defendant to shoot directly at and strike an occupied building"].) Thus, we reject Sarmiento's claim regarding the sufficiency of the evidence supporting the jury's determination.

Sarmiento raises a second challenge to the sufficiency of the evidence as well, claiming the evidence does not establish that the residence at issue was an "inhabited" dwelling house. For purposes of section 246, " 'inhabited' means currently being used for dwelling purposes, whether occupied or not." (§ 246; see *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1018 ["[I]t is settled that a building is considered 'inhabited' if there are permanent residents thereof, even if it is temporarily unoccupied."].) Thus, Sarmiento's argument turns on whether substantial evidence supports a finding that the building was a permanent residence. We conclude that substantial evidence supports such a finding.

Two categories of evidence support our conclusion. First, police officers testified that the neighborhood in question was "residential" and various individuals testified that they lived in the homes neighboring the one in question. Second, the prosecution introduced photographs showing two trash cans placed on the street immediately in front of the dwelling at issue and a broom and dustbin in the driveway of the dwelling. From this circumstantial evidence, the jury could have concluded that permanent residents inhabited and maintained the property at issue, such that it constituted an inhabited

dwelling house. (*People v. Brooks* (2017) 3 Cal.5th 1, 57 ["Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence."].)

Thus, viewing the record in the light most favorable to the judgment, we conclude that a jury reasonably could have concluded that Sarmiento willfully and maliciously discharged a firearm at an inhabited dwelling house in violation of section 246.

ii. *Lesser Included Offense*

Sarmiento also contends the trial court erred by not sua sponte instructing the jury regarding negligent discharge of a firearm (§ 246.3), a lesser included offense. Sarmiento argues it is reasonably probable the jury would have convicted him of the lesser included offense if the court had instructed the jury of that crime. We disagree.

"[A] trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. [Citation.] It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury. [Citation.] When there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense." (*People v. Booker* (2011) 51 Cal.4th 141, 181.) " 'On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.' " (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

As noted, section 246 prohibits a person from "maliciously and willfully discharg[ing] a firearm *at* an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar . . . or inhabited camper." (Italics

added.) "[S]ection 246 is violated when a defendant intentionally discharges a firearm either directly at a proscribed target (e.g., an inhabited dwelling house or occupied building) or in close proximity to the target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it. No specific intent to strike the target, kill or injure persons, or achieve any other result beyond shooting at or in the general vicinity or range of the target is required." (*Overman, supra*, 126 Cal.App.4th at p. 1361.)

Section 246.3, the statute prescribing grossly negligent discharge of a firearm, provides in pertinent part as follows: "[A]ny person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense." (§ 246.3, subd. (a).) "Section 246.3 was enacted in 1988, nearly 40 years after section 246, to address the 'growing number of urban California residents engaged in the dangerous practice of discharging firearms into the air during festive occasions.' [Citation.] Gross negligence, as used in section 246.3, 'requires a showing that the defendant's act was " 'such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.' " ' " (*Overman, supra*, 126 Cal.App.4th at p. 1361.)

Section 246.3 is a lesser included offense of section 246. (*Ramirez, supra*, 45 Cal.4th at p. 990.) "Section 246 proscribes discharging a firearm *at specific targets*, the act of which presumably presents a significant risk that personal injury or death will result. Section 246.3 proscribes discharging a firearm *in any grossly negligent manner*

which presents a significant risk that personal injury or death will result. [¶] The only difference between sections 246 and 246.3 is that section 246 requires that a specific target (e.g., an inhabited dwelling or an occupied building) be in the defendant's firing range. Section 246.3 does not include this requirement." (*Overman, supra*, 126 Cal.App.4th at p. 1362; see also *Ramirez, supra*, at p. 990.)

We conclude the trial court did not err in refusing to instruct the jury on section 246.3 because there is no evidence that Sarmiento committed that lesser included offense. As noted *ante*, police recovered 10 shell casings across the street from the residence at issue, where the shooter emerged from behind a parked truck, aimed, and fired. Bullet impact sites in the metal gate surrounding the residence and neighboring homes on the same side of the street confirm that the residence described in the amended information was in the line of fire. Further, neighbors who witnessed the shooting testified that the shooter deliberately waited for the victims to turn their backs before unleashing a barrage of bullets. One such bullet struck and killed Larussa, who collapsed and died in front of the residence described in the amended information. From this evidence, no reasonable jury could conclude that the residence at issue was *not* in the shooter's firing range. Nor was there substantial evidence to suggest that the shooter discharged his firearm in such a manner that it merely "could" result in injury or death to a person.

Thus, this case is distinguishable from *Overman*, on which Sarmiento relies. In that case, a jury convicted an employee of violating section 246 for discharging a firearm at his former employer's building after a workplace dispute. (*Overman, supra*, 126 Cal.App.4th at p. 1350.) The Court of Appeal reversed the conviction on grounds that

the trial court did not instruct the jury on negligent discharge of a firearm even though evidence supported the lesser included offense. (*Id.* at pp. 1362-1363.) The *Overman* court reached this conclusion because the witnesses testified they did not see where the defendant was aiming when he fired his rifle, there were no bullet holes or impact sites in the employer's building and property, and the witnesses testified that the defendant was an "excellent" marksman—substantial evidence from which the jury reasonably could have concluded the defendant fired his rifle *away* from the employer's building. (*Ibid.*)

By contrast, no similar evidence existed here. Rather, as just discussed, eyewitnesses testified that the shooter deliberately aimed and fired at his victims while they fled down the street, striking multiple residences and a surrounding metal gate in the process. No lesser included offense instruction was necessary.

E. *Section 654*

Finally, Sarmiento challenges the trial court's determination not to stay execution of the sentences for counts 4 and 5 (discharging a firearm at inhabited dwelling houses) on grounds that those sentences amount to multiple punishments for the same course of conduct under section 654. Sarmiento contends the shooter harbored one objective and intent to kill the Fallbrook gang member and fired a "single," "uninterrupted," and "continuous" volley of shots to accomplish that unitary purpose. Sarmiento asks us to direct the trial court to stay execution of the sentences for the two convictions at issue.

Section 654 provides in pertinent part as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case

shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The purpose of section 654 "is to ensure that the defendant's punishment will be commensurate with his culpability." (*People v. Sanders* (2012) 55 Cal.4th 731, 742.)

"The statute 'literally applies only where [multiple] punishment arises out of multiple statutory violations produced by the "same act or omission." [Citation.] However, . . . its protection has been extended to cases in which there are several offenses committed during "a course of conduct deemed to be indivisible in time." [Citation.]' [Citation.] [¶] 'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]. . . .[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' " (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The determination whether section 654 applies is factual and will be affirmed on appeal so long as it is supported by substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Viewing the evidence in the light most favorable to the respondent and presuming in support of the sentencing order the existence of every fact the trier could reasonably deduce from the evidence, we conclude that substantial evidence supports the trial court's

determination that section 654 does not apply. The Court of Appeal's decision in *People v. Trotter* (1992) 7 Cal.App.4th 363 (*Trotter*) is instructive. In that case, a police officer was in pursuit of the defendant when the defendant fired a shot at the officer's vehicle, fired a second shot at the officer's vehicle approximately one minute later, and fired a third shot at the officer's vehicle "[s]econds later." (*Id.* at pp. 365-366.) The Court of Appeal affirmed the trial court's determination that section 654 did not require a stay of execution of the sentences imposed for the defendant's three assault-related convictions and rejected the defendant's argument that each shot was " 'part and parcel' of a single course of conduct and [was] incidental to one objective." (*Id.* at p. 366.) As the *Trotter* court explained, "[e]ach shot required a separate trigger pull," was "volitional and calculated," and "evinced a separate intent to do violence" to the officer. (*Id.* at p. 368.)

Similarly, in *People v. Phung* (2018) 25 Cal.App.5th 741, the Court of Appeal affirmed a trial court's determination that section 654 was inapplicable, in a case in which a jury convicted the defendant as an aider and abettor of second-degree murder, attempted murder, shooting at an occupied motor vehicle, and street terrorism after the defendant's fellow gang member fired five bullets at a rival gang member's vehicle. Citing *Trotter*, the *Phung* court concluded that each shot fired at the rival gang member's vehicle entailed a "separate trigger pull" with a "separate risk to [the vehicle's] passengers" and, therefore, involved a separate intent and objective. (*Phung*, *supra*, at p. 761.) In particular, the court emphasized that the rival gang vehicle contained eight people and the shooter fired five bullets at the vehicle, striking it three times. (*Id.*)

As in *Trotter* and *Phung*, we conclude that substantial evidence supports a finding that each pull of the trigger evinced a separate intent and objective, thereby precluding application of section 654. As noted, police recovered 10 semi-automatic firearm shell casings from the spot where the shooter fired at his victims. The shooter unleashed this fusillade of shots consciously and deliberately over the span of approximately 30 seconds, according to eyewitness testimony—meaning an average of three seconds elapsed between each shot. Further, after the shooter struck one residence, he *continued* firing his weapon rather than stopping, striking a second residence and then a third residence. He likewise *continued* firing at the Fallbrook gang member as he ran fleeing down the street, even after he had already struck Larussa. Each one of these shots presented a substantial and separate risk of harm to the shooter's targets and the residents of the neighborhood.

Based on this evidence, we conclude that the trial court did not err in its determination not to stay execution of Sarmiento's sentences.[6]

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6 In light of our conclusion that substantial evidence supports the trial court's determination regarding the applicability of section 654, we do not address the parties' arguments regarding the multiple victim exception to section 654.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

IRION, J.